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Citations

STATUTES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 123

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,

Petitioner,

v.

GEORGE W. HARDEMAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief as *amicus curiae* in the instant case in support of the position of the Petitioner, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the Petitioner has been obtained. Counsel for Respondent has refused his consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred twenty-one affiliated labor organizations having a total membership of approximately thirteen million working men and women.

In the instant case the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, expelled George W. Hardeman as a member. The Union did so because his fellow members concluded, after a

proceeding in which Hardeman was served with a specific charge, was allowed ample time to prepare his defense and was accorded a hearing at which both he and his accusers were given a full opportunity to develop their contentions, that he had attacked and beaten the business agent of his Local in order to secure a job referral, and that this attack violated the Union's Constitution and By-Laws. The courts below reversed this judgment because they disagreed with the Union's interpretation of its internal law, and allowed the jury to mulct the Union for $152,150 in damages. The purpose of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, the federal law pursuant to which the decisions below were rendered was "to protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government." *Wirtz* v. *Hotel Employees Union Local 6*, 391 U.S. 492, 497 (1968). Here the rank and file members of the Union did participate fully in the democratic process of self-government. The expulsion they decreed served to safeguard the interest in the peaceful pursuit of such processes. Yet the outcome has been that their dues moneys are to be paid over to Hardeman to provide him with a lifetime annuity.

It is the AFL-CIO's view that such a result serves to thwart the practice of democratic self-government that it was the LMRDA's avowed aim to promote. For this reason we seek leave to file a brief *amicus* setting forth the Federation's views on the legal issues presented. That brief will concentrate on two points, both of which supplement the Union's arguments. First, that § 101(a)(5) of the LMRDA does not authorize the courts to review a union's determination that the misconduct charged states a violation under the union's constitution. And second, that Title I of the LMRDA is limited to the protection of membership rights and that the federal courts are not empowered to remedy alleged union interference with job rights, a subject which is within the exclusive primary jurisdiction of the National Labor Relations Board.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *amicus* brief in the instant case in support of the position of the Petitioner.

Respectfully submitted,

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August, 1970

IN THE

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No. 123

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,
Petitioner,
v.
GEORGE W. HARDEMAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*. The interest of the AFL-CIO is set out at pp. v-vi of that motion.

SUMMARY OF ARGUMENT

I

Section 101(a)(5) of the LMRDA provides a basic code of procedure, encompassing the service of "specific charges . . . time to prepare [a] defense [and] a full and fair hearing," designed to assure that a charged member will have a fair chance to defend his conduct by disproving the allegations against him. The courts below were of the view that this provision for procedural due process empowered them to review the Union's interpretation of its internal laws, as well as its determination that the specific

acts alleged were proved. But Congress considered and rejected, as inconsistant with the conception that Title I was to supplement, rather than supplant, state law by affording limited federal protection for basic membership rights, the proposition that the prohibition against improper discipline should empower the courts to measure the offense charged and proved against the union's constitution to ensure that the verdict was justified by union law. Thus, the courts below transgressed the limitation on judicial authority Congress decreed.

Section 101(a)(5) is the lineal successor of § 101(a)(6) of the "Bill of Rights" proposed by Senator McClellan as a floor amendment to S. 1555, the so-called "Kennedy-Ervin" Bill. Section 101(a)(6) contained both substantive and procedural guarantees. For it required that the discipline imposed by a union be based on "a breach of a published written rule of such organization," and whether a particular verdict has such a base turns on what the union rule in question means. If Senator McClellan's original § 101(a)(6) had been enacted it would have provided a firm support in law for the Fifth Circuit's view that the federal courts are empowered to measure the legal theory of the charge against the provisions of the union's constitution. But the published rule requirement did not survive. It was excised in response to Senator Kennedy's argument that it would create a federal straitjacket which would, *inter alia*, preclude union discipline of acts that could be characterized as *malum in se*, such a bribery or rape, and even though the member had been apprised of the specific misconduct he was being called to account for, given time to prepare his defense, and afforded a full and fair hearing on the charges made. Thus § 101(a)(5) was limited to procedural guarantees in order to preclude the possibility that the federal courts would create such a straitjacket. The courts below therefore committed plain error by overturning Hardeman's expulsion on the ground that in their view the charge failed to state a violation of the Union's Constitution.

II

In the instant case Hardeman sought and received damages on the theory that the Union discriminated against him in job referrals because he had been a "bad" member. It is well settled that such discrimination is an unfair labor practice. Sections 8(a)(3) and 8(b)(2) of the NLRA "were designed to allow employees to . . . be good, bad, or indifferent members . . . without imperiling their livelihood," *Radio Officers Union* v. *NLRB*, 347 U.S. 17, 40 (1954). And the most cursory review of the District Court proceedings demonstrates that despite the circumstance that it was tried in court and to a jury, the fact is that the damage claim here precipitated an unfair labor practice hearing. The courts below permitted this result because they read Title I as a grant of concurrent jurisdiction over activity violative of the NLRA which is alleged to have resulted from internal union discipline found to be improper under §101(a)(5). This reading of the LMRDA is erroneous. Congress intended that Title I would be limited to the protection of membership rights and that the NLRB was to have exclusive primary jurisdiction to regulate and protect job rights.

In 1947, Congress regulated union action against job rights with great particularity. At the same time, however, Congress made an explicit judgment not to regulate membership rights, *NLRB* v. *Allis-Chalmers*, 388 U.S. 175, 184-185 (1967). The result was to establish a clear-cut dichotomy between job rights whose protection was entrusted to the NLRB, and membership rights, which were to be regulated by the states. In essence, the LMRDA represented a congressional decision that it was necessary to enact legislation which would supplement the NLRA and state law by protecting membership rights through the Secretary of Labor and the federal courts. The main outlines of the 1959 legislation, and the legislative history of Title I demonstrate that, as was true in 1947, Congress's actions were rooted in the conception that employment rights and membership rights were separate and distinct.

In light of the fact that Title I of the LMRDA is limited to the protection of membership rights, it follows from the principles enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and in *Calhoon* v. *Harvey*, 379 U.S. 134 (1964), that the courts do not have the authority to remedy alleged union interference with job rights. For both *Garmon* and *Garner* v. *Local 776, Teamsters*, 346 U.S. 485, 490 (1953), demonstrate that the federal courts, as well as the state courts, are prohibited from trenching upon the exclusive primary jurisdiction of the NLRB. And *Calhoon* v. *Harvey* holds that it is improper to expand the scope of Title I if the result is to frustrate Congress's determination that two separate procedures—one administrative and one judicial—must be followed in order to secure the complainant the relief he desires, see, 379 U.S. at 139-141.

Machinists v. *Gonzales*, 356 U.S. 617, 618-621 (1958), held that a state court exercising its acknowledged jurisdiction over a membership dispute could, in order to "fill out" the remedy, award damages based on alleged union interference with job rights despite the fact that this "remedial action" invades the exclusive primary jurisdiction of the NLRB. In *Local 100 Plumbers* v. *Borden*, 373 U.S. 690, 697 (1963), the Court carefully reserved the question of "the extent to which the holding in *Garmon*, 359 U.S. 236, *supra*, qualified the principles declared in *Gonzales* with respect to jurisdiction to avoid consequential damages." It is our view that the *rationale* of *Garmon* completely undermines the above noted portion of *Gonzales*. The theory of *Gonzales* is unsound because its focus on the legal labels utilized to characterize the claim presented, rather than on the nature of the underlying activity in question, permits the plaintiff by artful pleading to shift the line of demarcation in the direction of greater or lesser court jurisdiction depending on the nature of his interests. This is completely inconsistent with the recognition that "Congress has entrusted administration of the labor policy for the Nation to [the NLRB]" and that "administration is more than a means

of regulation; administration is regulation," *Garmon*, 359 U.S. at 242, 243.

ARGUMENT

I

§101(a)(5) OF THE LMRDA DOES NOT AUTHORIZE THE COURTS TO REVIEW A UNION'S DETERMINATION THAT THE MISCONDUCT CHARGED CONSTITUTED A VIOLATION OF THE UNION'S CONSTITUTION

1. On October 11, 1960, Herman H. Wise, the business agent of Subordinate Lodge No. 112[1] of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO,[2] filed an intra-union charge alleging that George Hardeman, one of the Local's members, had violated Art. XII, Sec. 1 of the Local's By-Laws (which makes it an offense to use force or violence to prevent any Union official from properly discharging the duties of his office), and Art. XIII, Sec. 1 of the Local's Constitution (which makes it an offense to create dissension among the Union's members, or to work against the interest or harmony of the Local), in that:

> "at the union's office at 750 Conti Street at approximately 10:10 A.M., on October 5, 1960, when I walked out of my office into the waiting room with W. C. Bell . . . Mr. Hardeman raised up out of his chair and handed me a telegram and asked me to explain it. While I was reading the telegram, Hardeman, without warning, started beating me about the face and head, causing severe injury. . . . Hardeman continued to beat me about the face and head until he was exhausted. I then went back to the office 'phone and called the police." (A. 40-42)

This charge was heard by a three-member trial board on November 12, 1960 (A. 39-40). At the hearing W. C. Bell and Rufus Rains testified that Hardeman had attacked Wise (A. 43, 52). And Hardeman admitted that he had made a calculated decision to precipitate the affray:

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[1] Hereinafter "the Local."

[2] Hereinafter "the International."

> "[On] Oct. 3rd . . . I told [Wise] that I knew he had a telegram asking for me, and I was ready to go to work. Wise said he didn't know if he would send me or not . . . I told Wise then, 'You know I need to work and if you don't give me a referral, me and you are going round and round.' . . . I went to the hall Wednesday October 5th, and waited from the time the hall opened until we had the trouble. I tried to make up my mind what to do, whether to sue the Local or Wise or beat hell out of Wise, and then I made up my mind. . . . I . . . asked Wise why he didn't send me on the job, when I knew he had a telegram asking for me . . . Then the fight started." (A. 49-50)

The trial board found Hardeman guilty as charged. The Local's membership sustained this verdict and by a separate vote determined that Hardeman be expelled (A. 56). Thereafter on appeal the International's President and Executive Board affirmed (A. 56-60).

The International's Executive Board ruled on Hardeman's appeal on April 19, 1961. On April 4, 1966, Hardeman brought suit in the United States District Court for the Southern District of Alabama against the International, on the ground that the Union disciplinary proceedings had not complied with §101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, which provides:

> "No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

The District Court ruled (A. 36-38):

> "[W]hether or not [Hardeman] was rightfully or wrongfully discharged or expelled is a pure question of law for me to determine.

"There is no evidence in [the] transcript [of the trial board hearing] which would justify [Hardeman] being convicted or found guilty in Section 1 of Article 13 of the Subordinate Lodge Constitution. All that is in this transcript is about the fight. That is the whole thing that is in that transcript.

• • •

"I am telling you, as a matter of law, that under the proof, the finding which resulted in his being expelled, cannot legally stand and therefore he was wrongfully expelled.

"Now, what you Ladies and Gentlemen have to decide is this; was he thereby damaged, and, if so, how much."

The Fifth Circuit affirmed *per curiam* relying on its decision in *Boilermakers* v. *Braswell,* 388 F.2d 193 (5th Cir., 1968), which was characterized "as a case growing out of the exact factual situation as that involved in the present case" (A. 66-67). In *Braswell* the court below had reasoned (A. 76-78):

"Braswell does not deny that he struck Wise in the face and broke his nose. The question is whether this act constituted a violation of the Union Constitution and Bylaws that would justify his expulsion. . . . [T]he Union charged Braswell with violations of two provisions . . . Article XIII, Section 1 [of its Constitution] and . . . Article XII, Section 1 of the bylaws.

• • •

"[U]nder the authorities, Braswell's expulsion was not valid under either provision mentioned in the charges . . . [I]n *Allen* v. *International Alliance of Theatrical, Stage Employees and Moving Picture Operators,* 5 Cir. 1964, 338 F.2d 309, . . . we stated:

'In determining whether discipline was properly imposed • • • any ambiguity or uncertainty in the constitution must be construed against the union and in favor of the member, in accordance with well established principles of documentary construction.' 338 F.2d at 316.

"[W]e also rely on *Vars* v. *International Brotherhood of Boilermakers*, 2 Cir. 1963, 320 F.2d 576, 578. There the court observed:

'[I]mplicit in the requirement of a full and fair hearing is the requirement that there be some evidence to support the charges made. . . .'

"Applying these principles to the undisputed underlying facts we find that the act charged to Braswell was a blow struck in anger, and nothing more. However reprehensible this act may be, it did not constitute a violation of the provisions in the charges."

2. The theory of the intra-union charge filed by Wise was that on October 5, 1960, Hardeman had attacked and beaten a Local officer and that this attack constituted a violation of both Art. XII, Sec. 1 of the Local's By-Laws in that it was the use of force to influence the officer's decisions on job referrals; and Art. XIII, Sec. 1 of the Local's Constitution in that such an attack creates dissension within, and works against the interest and harmony of, the Local. Thus the charge raised two classes of questions. First, questions relating to the underlying facts: Did the attack take place as alleged; and second, questions relating to the proper interpretation of the Union's Constitution and By-Laws: Does such an attack come within the purview of the prohibitions just cited.

Section 101(a)(5) provides a basic code of procedure, encompassing the service of "specific charges . . . time to prepare [a] defense [and] a full and fair hearing," designed to assure that a charged member will have a fair chance to defend his conduct by disproving the allegations against him. The courts below were of the view that this provision for procedural due process empowered them to review the Union's interpretation of its internal laws, as well as its determination that the specific acts alleged were proved:

"Patently, [the Braswell opinion] was not an examination of the record to ascertain whether there was any evidence to support the expulsion. Rather, it was a judicial interpretation of the union's constitution and by-laws and a reversal of the union action based upon a

contrary interpretation." Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Society,* 43 N.Y.U.L. Rev. 227, 253 (1968).

But as we shall demonstrate Congress considered and rejected, as inconsistant with the conception that Title I should supplement, rather than supplant, state law by affording limited federal protection for basic membership rights, the proposition that the prohibition against improper discipline should empower the courts to measure the offense charged and proved against the union's constitution to ensure that the verdict was justified by union law. Thus, the courts below transgressed the precise limitation on judicial authority Congress decreed.

Section 101(a)(5) is the lineal successor of § 101(a)(6) of the "Bill of Rights" proposed by Senator McClellan as a floor amendment to S. 1555, the so-called "Kennedy-Ervin" Bill. Senator McClellan's § 101(a)(6) stated:

> "(6) *Safeguards Against Improper Disciplinary Action.*—No member of any such labor organization may be fined, suspended, expelled, or otherwise disciplined by such organization or any officer thereof except for breach of a published written rule of such organization which is not inconsistent with any of the provisions of this title. Disciplinary action may not be taken unless such member has been (A) served with a written copy of the provisions of the constitution and bylaws or other governing charter of such organization which contains a listing of the rights and safeguards afforded him pursuant to this title with respect to the conditions under which disciplinary action may be taken; (B) served with written specific charges; (C) given a reasonable time to prepare his defense; (D) afforded a full and fair hearing; and (E) afforded final review on a written transcript of the hearing, by an impartial person or persons (i) agreed to by such organization and the accused, or (ii) designated by an independent arbitration or mediation association or board." Dept. of Labor, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, Titles I-VI, 248.[3]

[3] Hereinafter "Leg. Hist."

~~of such organization," and whether a particular verdict has such a base turns on what the union rule in question means.~~

Senator Kennedy led the fight for rejection of the McClellan amendment to S. 1555. In his most comprehensive statement of opposition he noted there were "five reasons why I think the amendment is either poorly drafted or poorly conceived," Leg. Hist. at 270. After discussing the provision dealing with membership lists the Senator turned to § 101 (a)(6):

> "Second, I invite attention to page 4, section 6, 'Safeguards Against Improper Disciplinary Action.' Beginning on line 8, we read:
>
> > 'No member of any such labor organization may be fined, suspended, expelled, or otherwise disciplined by such organization or any officer thereof except for breach of a published written rule of such organization which is not inconsistent with any of the provisions of this title.'
>
> "In the case of Mr. Smith, in Tennessee, the Teamster official who bribed a judge, unless there were a specific prohibition against bribery of judicial officers written into the constitution of the union, then no union could take disciplinary action against officer or member guilty of bribery.
>
> "If a union officer were guilty of rape, unless a prohibition against rape were written into the union constitution, the union would be prohibited from taking any disciplinary action against an officer or member who committed such a crime.
>
> "It seems to me that we can trust union officers to run their affairs better than that." Leg. Hist. at 271.

At first it appeared that Senator Kennedy's arguments were to be without effect. The Senate originally passed the McClellan "Bill of Rights." But subsequent developments demonstrate that Senator Kennedy's arguments did have a substantial impact. For Senator Kuchel, on behalf of a bipartisan group of Senators who had come to the conclusion that the McClellan proposal went too far in the direction of government control of internal union affairs, introduced a substitute "Bill of Rights," Leg. Hist. at 282-283. The

Kuchel substitute transformed § 101(a)(6) into § 101(a)(5) in its present form. And the new § 101(a)(5) was responsive to Senator Kennedy's criticism of the McClellan proposal, for it struck the requirement that discipline must be based on a published written rule. Senator Kuchel stated:

> "On the basis of the debate [on the McClellan proposal], I concluded—as did many other Senators—to support the bill of rights amendment offered by the Senator from Arkansas. . . .
>
> "The next day, I, like many of my colleagues, read the text of the amendment offered by the Senator from Arkansas for which I had voted. . . .
>
> "Others of my colleagues on both sides of the aisle did what I did—read and studied the amendments. It became apparent that there were some obvious questions as to parts of the language used. I concluded that in this proposed legislation there were provisions which were imperfectly drawn, which should be improved, and changed.
>
> "Thus, with some of my colleagues on this side of the aisle and with some of my colleagues on the other side of the aisle, I began to explore the possibility of keeping that which the Senator from Arkansas advocated, namely, a bill of rights for labor, but of writing those rights in clear, unmistakable, reasonable, and just terms. That is what we tried to do.
>
> • • •
>
> "We believe, Mr. President, that [the] language [of § 101(a)(5)] is clear and explicit, and provides the usual reasonable constitutional basis upon which charges might be brought. We believe further that the language in subdivision (6) of the amendment of the able Senator from Arkansas, upon which we voted the other night, did raise some rather vexing questions. . . ." Leg. Hist. at 283-284.

After the Kuchel amendment had been adopted consideration of the "Bill of Rights" began in the House Committee on Education and Labor. Both Senator McClellan, as a supporter of the Senate bill, and Senator Goldwater, as a critic of that bill on the ground that its limitations on union conduct were not sufficiently stringent, testified before the Committee in order to give it the benefit of their considered views on the meaning of S. 1555. Both recognized the limited scope

of § 101(a)(5). Senator Goldwater in reviewing and comparing the McClellan and Kuchel proposals, noted:

> "The bill of rights in the Senate bill requires that the union member be served with written specific charges prior to any disciplinary proceedings but it does not require that these charges, to be valid, must be based on activity that the union had proscribed prior to the union member having engaged in such activity. In contrast, the McClellan bill of rights which was stricken after having been adopted, prohibited any disciplinary action against a union member unless it is based on a breach of a published written rule of such labor organization." Leg. Hist. at 308.

And as to § 101(a)(5), Senator McClellan stated:

> "The AFL-CIO contends that section 101(a)(5), which provides safeguards against improper disciplinary action, is unreasonable because the requirement of 'written specific charges' is too vague; because 'full and fair hearings' are too uncertain; . . . The answer: A charge must only be specific enough to inform the accused member of the offense that he has allegedly committed." Leg. Hist. at 315.

The Landrum-Griffin bill as introduced in the House incorporated § 101(a)(5) as passed by the Senate, and the Committee Bill, H.R. 8342, while differently worded, was acknowldged to be without "substantive difference," Leg. Hist. at 331. Thus, to all intents and purposes the debate on § 101(a)(5) ended in the Senate.

If Senator McClellan's original § 101(a)(6) had been enacted it would have provided a firm support in law for the Fifth Circuit's view that the federal courts are empowered to measure the legal theory of the charge against the provisions of the union's constitution. For under § 101(a)(6) discipline could have been imposed only for a breach of a published written rule. To implement this substantive guarantee the courts would have had to decide whether the specific misconduct charged was interdicted by the union constitution. The courts, in other words, would have had to interpret the union's constitution in order to measure the va-

lidity of the verdict. But the published rule requirement did not survive. It was excised in response to Senator Kennedy's argument that it would create a federal straitjacket which would, *inter alia,* preclude union discipline of acts that could be characterized as *malum in se,* such as bribery or rape, and even though the member had been apprised of the specific misconduct he was being called to account for, given time to prepare his defense, and afforded a full and fair hearing on the charges made.

Thus § 101(a)(5) was limited to procedural guarantees in order to preclude the possibility that the federal courts would create such a straitjacket. And as Senator Goldwater's testimony to the House demonstrates, all concerned recognized that § 101(a)(5), as opposed to Senator McClellan's § 101(a)(6), would not authorize the courts to grant relief to a member whose essential complaint was that the charge against him was defective in that the misconduct alleged was not interdicted by the union's constitution and by-laws. The courts below therefore committed plain error by overturning Hardeman's expulsion on the ground that in their view the charge failed to state a violation of the Union's Constitution.

Three basic caveats to the foregoing are in order. First, it is not our purpose to challenge the generally accepted view that in a § 101(a)(5) case the courts are empowered to assure that there is "some evidence" to support the verdict. This view is based on the premise that it is essential to fair procedure that the member be served in advance of trial with a charge which informs him exactly which of his actions he is being called to account for. The value of a specific charge in turn depends on the charging party being required to come forward at the hearing with evidence to support the specific charge made. Thus, as recognized in *Vars* v. *Boilermakers,* 320 F.2d 576, 578 (2d Cir., 1963), relied on in *Braswell* (A. 78), "implicit in the requirement of a full and fair hearing is the requirement that there be some evidence to support the charges made." For the requirement of specific charges "means that the subsequent discipline must be

based upon the charges served" (*Vars*, 320 F.2d at 579, Hays J., concurring). And if there is no evidence supporting the charge, a court reviewing the proceeding is forced to conclude that this limitation has not been met:

> "If there is to be no examination of [the union] hearing upon judicial review under section 101(a)(5), except as to matters of procedure, those procedures can easily be converted into empty formalities entirely lacking the substance of actual judgment implicit in the term 'full and fair.' Accordingly, it is difficult to disagree with the Second Circuit's belief that some review of the basis of the union tribunal's judgment is necessary." Christensen, 43 N.Y.U.L. Rev. at 251-252.

There is, however, nothing in § 101(a)(5), or the foregoing argument from its structure and logic, which leads to the conclusion that the procedural purposes of that Section require the courts to decide whether the theory of the charge is sound as a matter of internal union law. Indeed, the "some evidence" rule itself is a threat to vital competing values relating to union autonomy and such a further step would entirely undercut those values:

> "The essential question remains as to whether or not it is possible to keep the range of [the] review [established in *Vars*] within limits; limits which are vital if the federal bench is not to become an inexpert, super-international trial board appeals tribunal.
>
> "A standard requiring reversal of a trial board where there is no evidence in the record to sustain its verdict is perhaps unavoidable. But the 'no evidence' rule, . . . requires the utmost in judicial restraint if it is not to slowly but surely transform itself into a balancing of evidence test. . . . A statutory requirement of a 'full and fair hearing' is considerably short of an authorization for full judicial review of the 'law' and the facts. Congress, by using the phrase, may well have intended that the courts not rubberstamp empty verdicts merely because notice and hearing formalities were observed. But assuredly, Congress is familiar enough with the drafting of judicial review provisions to have authorized the federal district courts to assert broader powers

> in plain language—if that is what was desired. The obvious tenor of section 101(a)(5) is to establish rules essentially procedural in nature, rather than to furnish district court review of the merits of a dispute between member and union. . . . [Thus] decisions such as Braswell . . . are not based upon visible statutory authority for the scope of their review. Conversely, they establish judicial power in precisely the most damaging fashion, *i.e.*, by making a union's interpretations of its own basic 'law' subject to the removed, untutored, and possibly antipathetic judgment of a court." Christensen, 43 N.Y.U.L. Rev. at 252, 253, 254.

And as we have shown, during the evolution of § 101(a)(5) Congress recognized the importance of these competing considerations and in order to serve them, precluded judicial review of the union's interpretation of its constitution and bylaws.

Second, the reading of § 101(a)(5) we propose does not prevent the courts from interpreting a union constitution in cases involving a claim, which could not be made here, that the discipline imposed worked a deprivation of the basic substantive rights guaranteed by § 609. Sections 101(a)(1) and (2) do incorporate substantive guarantees. And the preservation, in those Sections, of union authority to enact "reasonable rules" requires judicial interpretation of the union's internal law. Thus, the argument against the expansive scope of judicial review over pure § 101(a)(5) actions undertaken in *Braswell* does not mean that:

> "where the action of a trial board directly contravenes some other provision of the Act's Bill of Rights by, for example, imposing discipline for use of the freedom of speech guaranteed therein, the court should, or could, view section 101(a)(5) in total isolation from section 101(a)(1). But the substantive principles invalidating the disciplinary actions in those circumstances arise from the statute, not from judicial views as to the meaning of a constitutional provision or a judicial balancing of the evidence." Christensen, 43 N.Y.U. L. Rev. at 254.

Indeed the fact that Congress specified the substantive interests it deemed worthy of protection relieves what might otherwise be a felt necessity to expand §101(a)(5) beyond its intended reach in order to assure that union disciplinary proceedings do not interfere with the public interest in free and democratic trade unionism, compare the explanation of the development of the relevant common law in Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 Yale L.J. 175 (1960).

Finally, we wish to emphasize that the decision below is erroneous even assuming *arguendo* that §101(a)(5) does allow the courts to review the union's interpretation of its internal law. The basic premise articulated in *Braswell* is that "any ambiguity or uncertainty in the constitution must be construed against the union" (A. 78). But a union constitution is not a contract of adhesion. It is a charter of self-government, enacted by the members, subject to revision by democratic means and administered by elected officers. Thus, the generally accepted rule is "that courts will accept the correctness of an interpretation fairly placed on union rules by the union's authorized officials," *English* v. *Cunningham*, 282 F.2d 848, 850 (D.C. Cir., 1960). As the Third Circuit recognized in *Lewis* v. *AFSCME*, 407 F.2d 1185 (3rd Cir., 1969), this rule is supported by:

> "The reasoning of the Supreme Court in the 'Steel Workers Trilogy' . . . [which emphasized] that labor matters are best left to those who understand the language and the workings of the shop, those who have a precise knowledge of what has come to be known as the 'industrial common law,' [and that] even the 'ablest judge cannot be expected to bring the same experience and competence [as an arbitrator] to bear upon the determination of a grievance, because he cannot be similarly informed' . . . [This reasoning] applies with equal force to cases arising out of an internal union discipline. 'The provisions of the L.M.R.D.A. were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. Courts have no special expertise in the opera-

> tion of unions which would justify a broad power to interfere * * * General supervision of unions by courts would not contribute to the betterment of the unions or their members or to the cause of labor-management relations.' *Gurton* v. *Arons*, 339 F.2d 371 (2 Cir. 1964)."

And, of course, the general rule is in accord with Congress's concern that "in establishing and enforcing statutory standards great care should be taken not to undermine union self government." S. Rep. No. 187, 86th Cong., 1st Sess., quoted in *NLRB* v. *Allis-Chalmers*, 388 U.S. 175, 194 (1967).

It is beyond dispute that the provisions of union law (Art XII, Sec. 1 of the By-Laws and Art. XIII, Sec. 1 of the Constitution) relied on by the Local and International, if fairly interpreted, do support the expulsion of Hardeman. The attack on Wise fits the proscription on the use of force to prevent an officer from discharging his duties exactly. And it is entirely rational to say that such an attack creates dissension and disharmony. One does not have to be a student of the Final Report of the National Commission on the Causes and Prevention of Violence, xv (1969), to recognize that the settlement of the type of dispute present here by force threatens the organization as a functioning entity just as surely as dual unionism. The Fifth Circuit's view that "[Hardeman's] fist was not a . . . threat to the union as an organization and to the effective carrying out of the union's aims" (A. 78-79) is simply bad political science and worse law.

The error of the courts below is that they did not even consider the possibility that the Union's views on the meaning of its Constitution and Bylaws were worthy of respectful consideration. Indeed, their opinions make it apparent that despite the anomaly in finding such authority in a provision providing for procedural due process they viewed §101(a)(5) as allowing them to treat the proper interpretation of the Union's Constitution as a matter of first impression within their entire control. And it is certain that they did not give any weight to the consideration that their reading of the Constitution and Bylaws substantially

eroded the Union's ability to protect its interest in peaceful procedures. In sum, the decisions below are a paradigm of the unsound results which are bound to flow from the failure to appreciate the value of union autonomy.

II

TITLE I OF THE LMRDA IS LIMITED TO THE PROTECTION OF MEMBERSHIP RIGHTS AND DOES NOT AUTHORIZE THE COURTS TO REMEDY ALLEGED UNION INTERFERENCE WITH JOB RIGHTS

1. The Complaint suggests that the instant case presents a single substantive issue: Did the Union disciplinary procedures which led to Hardeman's expulsion from membership meet the standards of §101(a)(5) (A. 2-8). The most cursory review of the District Court proceedings, however, demonstrates that in reality two substantive issues were tried: the validity of the expulsion under § 101(a)(5); and the question of whether the Union discriminated against Hardeman in the operation of its referral system in violation of §§ 8(a)(3) and 8(b)(2) of the National Labor Relations Act, as amended 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*

The instant suit is for damages and Hardeman's expulsion, standing alone, could only have resulted in actual damages for loss of fraternal benefits and possibly for pain and suffering. Recognizing this, his pleadings alleged that as a "proximate result" of the alleged §101(a)(5) violation Hardeman was "unable to work now that he has lost his Union Card and membership in the Union" (A. 4). Obviously, this "result" did not flow from the Union's official disciplinary proceedings; the sole penalty decreed was expulsion. Nor did it flow from any physical impairment visited upon Hardeman by the Union; he was as able to work the day after his expulsion as the day before. Finally, it did not flow from any legal inhibition upon Hardeman, or the employers who might wish to utilize his services, growing out of his expulsion. For it is perfectly well settled that:

> "The policy of the [NLRA] is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers Union* v. *NLRB*, 347 U.S. 17, 40 (1954).

Thus the alleged job loss here was not a direct consequence of the expulsion. The question of whether the Union was responsible for Hardeman's failure to secure work turned on an inquiry into events subsequent to and distinct from that discipline. And this inquiry took the same course as would an NLRB hearing to determine whether any union was guilty of a violation of §8(b)(2) as construed in *Radio Officers*. To make his case, Hardeman testified that he had received only one referral after his expulsion and that he was unable to secure work at the shops and shipyards in the Mobile area which employed boilermakers, and he attributed his difficulties to the Union's animosity (A. 17-21). The Union defended against the charge that Hardeman's loss of membership had cost him work by showing that during 1960 and 1961 construction jobs within its jurisdiction were so scarce that the maximum percentage of its members employed at any one time was 25%, that its referral system for construction jobs was non-discriminatory and was open to non-members and members on an equal basis (as to this point the Union was corroborated by Kittrell, a witness called by Hardeman), that as to non-construction work half the boilermakers working in the shops and shipyards were non-members, that Hardeman was referred out immediately after he was expelled, and that after May 3, 1961, Hardeman was ineligible for referral because he did not register his availability monthly as required by the rules printed on the referral card he had in his possession (A. 22-35). The trial of the "damage" issue, therefore, focused on the reasons for Hardeman's failure to receive a job referral and ultimately on the Union's motives. And of course the responsibility to ascertain whether a refusal to refer is for a union reason is at the heart of the NLRB's mandate, see,

e.g., NLRB v. *Great Dane Trailers,* 388 U.S. 26 (1967); *Local 357 Teamsters* v. *NLRB,* 365 U.S. 667 (1961). Thus despite the circumstance that it was tried in court and to a jury, the fact is that Hardeman's claim for damages precipitated an unfair labor practice hearing.

The foregoing brief summary of the evidence amply supports this Court's conclusion that "the problems inherent in the operation of union hiring halls are difficult and complex . . ." *Local 100 Plumbers* v. *Borden,* 373 U.S. 690, 695 (1963). It is our view that Congress has reserved resolution of these "difficult and complex . . . problems" to the NLRB, the "single expert federal agency" *ibid.,* created to deal with questions relating to alleged union interference with employment rights; and that while the federal courts have jurisdiction to hear claims dealing with interference with membership rights, this does not provide authority to invade the primary exclusive jurisdiction of the Board as explicated in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959), under the rubric of awarding consequential damages for an expulsion from membership found to be improper under the LMRDA.

2. In *Braswell,* the Fifth Circuit stated "the [exclusive primary jurisdiction] question is one of Congressional intent. . . . A clear indication therefore of Congressional intent to confer jurisdiction on the federal district courts to award damages for actions—even if these actions were also violations of the NLRA and within the jurisdiction of the NLRB—would control" (A. 73). This is entirely fair so far as it goes. There can be no doubt that when it wishes to do so Congress can invest the federal courts and the NLRB with concurrent jurisdiction over unfair labor practices, compare §8(b)(4) with §303. But Congress in enacting Title I of the LMRDA did not so intend—as we shall now demonstrate.[4]

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[4] The lower courts are in a certain disarray as to this issue, see, *e.g., Barunica* v. *Hatters,* 321 F.2d 764, 767 (8th Cir., 1963) (Blackmun J.) (LMRDA complaint "relat[ing] only to discrimination in regard to hire" preempted); *Rekant* v. *Shochtay-Gasos Local*

As *Radio Officers* makes clear, in 1947 Congress regulated union action against job rights with great particularity. At the same time, however, Congress made an explicit judgment not to regulate membership rights. As this Court noted in *Allis-Chalmers*, 388 U.S. at 184-185:

> "It is significant that Congress expressly disclaimed in connection [with §8(b)(2)] any intention to interfere with union self-government or to regulate a union's internal affairs. The Senate Report stated:
>
> 'The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership.'
>
> "Senator Taft, in answer to protestations by Senator Pepper that §8(b)(2) would intervene in the union's internal affairs and 'deny it the right to protect itself against a man in the union who betrays the objectives of the union . . . ,' stated:
>
> '*The pending measure does not propose any limitation with respect to the internal affairs of unions.* They still will be able to fire any members they wish to fire, *and they still will be able to try any of their members.* All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than non-payment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion.' (emphasis supplied)"

The result was to establish a clear-cut dichotomy between job rights, whose protection was entrusted to the NLRB, and membership rights, which were to be regulated by the states.

446, 320 F.2d 271 (3rd Cir., 1963) (no preemption); *Figueroa* v. *NMU*, 342 F.2d 400, 405 (2nd Cir., 1965) ("There is room for reasonable debate . . . where there has been both an 'arguable' unfair labor practice . . . and also a failure to comply with . . . Section 101(a)(5) . . . on the question of the preemptive jurisdiction of the Labor Board").

In essence, the LMRDA represented a congressional decision, prompted by the hearings of The Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee), that it was necessary to enact legislation which would supplement the NLRA and state law by protecting membership rights through the Secretary of Labor and the federal courts:

> "In 1959 Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline." *Allis-Chalmers,* 388 U.S. at 175.

Titles II-VI of the LMRDA dealing with reporting, trusteeships, union elections, fiduciary standards for union officers and the enforcement mechanisms for these titles, comprise a subject matter (purely internal union affairs) completely separate from that dealt with in the NLRA. And Title VII which does regulate subjects intimately related to labor-management relations, the so-called "hot cargo" agreement, organizational picketing, pre-hire agreements in the construction industry, and the right of economic strikers to vote in representation elections, continued the pattern established in 1947 of entrusting such regulation to the NLRB. Thus, the main outlines of the 1959 legislation demonstrate that, as in 1947, Congress's actions were rooted in the conception that employment rights and membership rights were separate and distinct. And, of course, if that conception ruled in Title I, as well as Titles II through VII, the conclusion would be that the courts were not to take jurisdiction over alleged union interference with job rights.

Given the overall pattern just noted, one would expect that if Congress intended the courts to go beyond suits alleging interference with membership rights, there would be a plain and unequivocal manifestation of that desire. We have searched the legislative history with care; its most notable aspect is its silence as to the applicability of Title I

to union interference with job rights. There were no criticisms of the applicable NLRA law; no attempts to amend §§8(a)(3) and 8(b)(2); and no move to transfer the Board's jurisdiction over this class of unfair labor practices to the courts on the ground that this facet of the law was being maladministered. The arguments advanced in support of Title I were all but devoid of reference to job rights. And the few exceptions were in the nature of rhetorical flourishes which did not even acknowledge that §§8(a)(3) and 8(b)(2) were on the books, Leg. Hist. at 243, 308-309, 352-353.

Thus, the debate on Title I fails to establish a predicate for the conclusion that Congress desired to create an exception to the norm pursuant to which the NLRB exercises exclusive jurisdiction over charges whose substance is that §§8(a)(3) and 8(b)(2) have been violated. Indeed, the one aspect of the debate on Title I which throws a sustained light on this subject supports the inference that the premise shared by the legislators concerned with the development of Title I was that the subject matter of that Title was at the time open to the states, and that this state jurisdiction should be, and could be, preserved by a specific provision making it plain that the new jurisdiction granted the federal courts was not intended to preempt state law. Thus the first objection Senator Kennedy voiced to the McClellan "Bill of Rights" was that:

> "members of unions are provided the rights specified in Title I more satisfactorily by present State law, by the provisions of the bill, and by the Taft-Hartley Act.
>
> "I say that because I think the amendment raises the question of preemption. In other words, if the proposal were enacted, the present rather exhaustive remedies provided under the common law of the various States might be wiped out, and only the rights suggested by the Senator from Arkansas would then be available to union members." Leg. Hist. at 255.

Senators McClellan, Kuchel and Holland all responded by agreeing that this objection was soundly based, Leg. Hist.

at 255-265. And Senator McClellan therefore introduced an amendment to preclude the possibility that the LMRDA would preempt other remedies, Leg. Hist. at 266. It was adopted and is now §603. Finally, the Kuchel substitute supplemented §603 with the present §103 which preserves other federal and state rights and remedies, Leg. Hist. at 289, 300.

At the same time the Congress responded to the problem of the "no man's" land recognized in *Guss* v. *Utah L.R.B.*, 353 U.S. 1 (1957) by preserving exclusive Board jurisdiction as to all unfair labor practices, with the exception of a limited class which in the words of Senator Goldwater, the author of §14(c), have only "a slight impact on commerce." This contrast is comprehensible only on the hypothesis that Congress recognized that the areas regulated by the NLRA and the LMRDA were separate and distinct. For it would make no sense at all to preserve the power of the states to deal with LMRDA offenses, while preempting their authority to deal with unfair labor practices if the two Acts overlapped. On the other hand, if Congress had been acting on the view that there was a dichotomy between membership rights and employment rights, the differing approaches to preemption in the NLRA and LMRDA make perfect sense: centralized administrative expertise in the field of job rights was to continue; and the decentralized approach to settling questions concerning membership rights through the courts was also to remain the norm.

The inference that Congress intended to limit Title I to the protection of membership rights is strengthened by the fact that extending that Title to alleged interference with job rights would introduce a basic anomaly in the law that should not be lightly imputed to the legislature. It is a basic postulate of federal labor policy that the right to "abstain from joining any union without imperiling [one's] livelihood" is of the same dignity as the right to be a "good, bad or indifferent member," *Radio Officers*, 347 U.S. at 40. There is certainly nothing in the LMRDA's legislative history to indicate that the prime movers behind Title I,

Senators McClellan and Kuchel and Representatives Landrum and Griffin felt otherwise, and were of the view that a union member deserved greater legal protection against job discrimination than a non-member. But Title I can only be invoked by union members. This is readily understandable as long as Title I is restricted to membership rights, for by definition a non-member has no such rights to protect. On the other hand, this limitation is all but incomprehensible if Title I is interpreted to provide a remedy for loss of job rights. For the LMRDA would then open the court house doors for the "bad" member alleging an illegal refusal to refer him to a job despite the fact that those doors would be firmly closed to a non-member with the same complaint.

3. The foregoing establishes that Title I is limited to the protection of membership rights. It follows from the principles enunciated in *Garmon* and in *Calhoon* v. *Harvey*, 379 U.S. 34 (1964), that the courts do not have the authority to remedy alleged union interference with job rights. The Fifth Circuit in *Braswell*, however, took the position that "the purpose" of the NLRB's exclusive primary jurisdiction "is to prevent conflicts between federal and state policy" (A. 72). That assuredly is *a* purpose of the *Garmon* rule but it is not *the* purpose.

In *Garner* v. *Local 776 Teamsters*, 346 U.S. 485, 490 (1953), the Court stated:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local . . . attitudes

> toward labor controversies. . . . A multiplicity of tribunals . . . are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

The foregoing *rationale,* as *Garner* specifically points out, "prohibits federal courts from intervening in [NLRA] cases, except by review or on application of the federal Board . . . cf. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41," *id.* at 490. For, as the Court added in *Garmon,* while discussing the implications of *Garner*:

> "[t]he unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience.
>
> • • •
>
> "Administration is more than a means of regulation; administration is regulation." 359 U.S. at 242, 243.

The instant case demonstrates the accuracy of the *Garmon* opinion's insight. *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 198-199 (1941), establishes that "only actual losses [incurred by a discriminatee] should be made good" and that "losses which he willfully incurred" should be deducted from the amount he receives to make him "whole for losses suffered on account of an unfair labor practice." Thus it is part of the national labor policy to insure that the remedy for illegal discrimination does not encourage unreasonable refusals to work, and that the discriminatee, no less than the discriminator, does not profit from the unfair labor practice.

In the instant case mortality tables were introduced at the trial and Hardeman testified that he earned $5500-$6000 per year prior to his explusion from the Union (Tr. 127, 202). On this basis, counsel for Hardeman argued to the jury that Hardeman's consequential damages were at least $130,231.52, which represented his past and future loss of

wages from the date of his expulsion in 1960 until his projected retirement in 1983 at age 65 (Tr. 413-417). The District Court then charged the jury that it could find both compensatory and punitive damages (Tr. 446-447), and the jury returned a verdict for Hardeman in the amount of $152,150 (A. 64-65).

This award of damages for future loss of employment is inconsistent with *Phelps Dodge* for it will either encourage an unreasonable refusal to seek employment by one who might otherwise contribute skilled services to society, or in the alternative will afford a windfall which the NLRA denies persons who have lost job rights due to discrimination based on union membership or non-membership. The Brief in Opposition to Certiorari, p. 17, justified the award of damages for loss of future employment in the following terms:

> "[Hardeman] is in the same predicament as a disabled man. When a man is disabled in an automobile accident and because of his disability he is unable to follow his chosen profession and earn a livelihood, the tort feasor is liable to the injured party for all future wages that he will lose."

We think that this is an accurate assessment of the basis on which the jury and the courts below arrived at the determination that Hardeman had been injured and calculated the damages he was to be awarded. But the nature of the remedy for loss of employment due to incapacitation from an automobile accident is entirely distinct from the issue here; for in the instant case there is no bar to Hardeman's returning to work.

It is entirely understandable that a court, and under the court's direction a jury, would fall into this error, for personal injury litigation is a staple of judicial business. But it is unlikely that the NLRB would make such a mistake. This is not because the Board has greater wisdom than the courts, but because vindication of job rights which have been lost for union-connected reasons is the staple of the Board's business. And even as the courts in thousands of

cases award damages based on actuarial principles for loss of employment due to personal injuries, so does the Board in thousands of discrimination cases award reinstatement and back pay (subject to an obligation to mitigate damages). It is precisely to preserve the exclusive right of the Board to pass on allegations of, and to remedy, discriminatory loss of job rights that the courts must be held to lack jurisdiction to award damages for such losses.

4. During the past several years this Court has had occasion to pass on the interrelation of the Board's jurisdiction and that of the federal courts under both §301, *Smith* v. *Evening News*, 371 U.S. 195 (1962), and the judicially created doctrine of fair representation, *Vaca* v. *Sipes*, 386 U.S. 171 (1967); see also, *Meatcutters* v. *Jewel Tea*, 381 U.S. 676, 684-688 (1965), involving the antitrust laws. Those decisions, which were in favor of court jurisdiction:

> "demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." *Vaca*, 386 U.S. at 180.

The basic "effect on the administration of the national labor policy" of a holding in favor of Board jurisdiction in both *Smith* and *Vaca* would have been to destroy an undoubted jurisdiction of the courts. For there can be no doubt that Congress deliberately chose to utilize the courts, rather than the NLRB, as the tribunal to hear suits on collective agreements, see, *e.g.*, *Dowd Box* v. *Courtney*, 368 U.S. 502, 513 (1962). And as Professor Sovern concluded after an exhaustive review of the §301 preemption problem:

> "In sum, *Garmon* cannot be applied to contract actions without depriving parties of a forum for the expeditious settlement of their contract claims. If for some definable class of cases involving collective agreements it could be said . . . that the Board can give all that the courts can give, application of *Garmon* would be appropriate. But no such class is apparent." Sovern,

Section 301 And The Primary Jurisdiction of the NLRB, 76 Harv. L. Rev. 529, 572 (1963).

In other words, given the practical realities of the interrelationship between §§7 and 8 and 301, Congress's desires would have been frustrated by the application of *Garmon*.

While *Vaca* is closely related to, and rests in part on *Smith*, see, 386 U.S. at 183-186, it also reflects an additional facet of the exclusive primary jurisdiction problem. As just noted, the prime consideration in the decision not to apply *Garmon* in §301 suits was that to do so would hobble the courts in administering a responsibility placed upon them by Congress. A decision to follow *Garmon* in *Vaca* would have had an even more far-reaching effect. Since the Board's "tardy" entrance into the field consisted of accepting the substantive law "as it had been developed by the federal courts" application of *Garmon* would have completely displaced the judiciary's "traditional supervisory jurisdiction" to assure fair representation; a jurisdiction assumed in order to forestall "grave constitutional problems," and as to which "it can be doubted whether the Board brings substantially greater expertise to bear . . . than do the courts" 386 U.S. at 181-183. Indeed, in light of the above it could even be said that the real question in *Vaca* was whether the courts had primary exclusive jurisdiction.

The instant case stands in sharp contrast to *Smith* and *Vaca*. Here there is no difficulty in allocating to the NLRB that which is the Board's, and to the federal courts that which is the courts', without infringing on the ability of either to function effectively. The "nature of the activity . . . sought to be regulated" *Garmon*, 359 U.S. at 243, provides a reliable guide to decision. For as just developed, pp. 20-25 *supra*, the jurisdiction of the Board relates to the regulation and protection of employment rights, while the jurisdiction of the courts under the LMRDA relates to the regulation and protection of membership rights. There will, of course, be cases in which the complainant alleges that as the result of a single dispute the union has moved against

both his job rights and membership rights. But as the evidence in the instant case indicates, these two claims never fuse into one. The distinction between the act of expelling, suspending or firing a union member as a member, and the separate act of seeking his discharge, or refusing to refer him to work, will always be manifest. Both may stem from a common base, the underlying dispute, but it is their nature to branch out in separate directions. Thus, the proof required to show an illegal expulsion and an illegal refusal to refer will always tend to be separate and distinct rather than overlapping. Moreover, a line of demarcation between Board and court jurisdiction based on the employment rights-membership rights dichotomy may require that two separate suits be pursued. But this is by no means inconsistent with the congressional understanding of the scope of Title I of the LMRDA. For in a wholly analogous situation this Court has squarely held that it is improper to expand the scope of Title I if the result would be to frustrate Congress's determination that two separate procedures—one administrative and one judicial—must be followed in order to secure the complainant the relief he desires:

> "We hold that possible violations of Title IV of the Act regarding eligibility are not relevant in determining whether or not a district court has jurisdiction under §102 of Title I of the Act. Title IV sets up a statutory scheme governing the election of union officers . . . Section 402 of Title IV, . . . sets up an exclusive method for protecting Title IV rights, by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election because of violations of Title IV. Upon complaint the Secretary investigates and if he finds probable cause to believe that Title IV has been violated, he may file suit in the appropriate district court. It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest. Cf. San Diego Building Trades Council v. Garmon, 359 US 236. In so doing Congress, with one exception not here relevant, decided not to permit individuals to block or delay union elec-

> tions by filing federal-court suits for violations of Title IV. . . . [We] are satisfied that the Act itself shows clearly by its structure and language that the disputes here, basically relating as they do to eligibility of candidates for office, fall squarely within Title IV of the Act and are to be resolved by the administrative and judicial procedures set out in that Title." *Calhoon* v. *Harvey*, 379 U.S. at 139-141.

By the same token Congress has chosen to utilize the "special knowledge and discretion" of the NLRB, "the agency of government most familiar with" the subject (*id.* at 140) as the exclusive method of protecting employment rights. Thus the parallel to the instant case is plain. For in *Calhoon* v. *Harvey* the complainant attempted to expand the scope of Title I to permit the trial of Title IV issues in a suit brought by an individual member pursuant to §102. The argument presented was that this expansion was necessary to insure that complete relief could be granted in a single law suit. This Court rejected this attempted expansion of Title I on the ground that the LMRDA's "structure and language" demonstrated that the Secretary of Labor's authority to enforce Title IV was "exclusive." Here Hardeman sought, and was allowed to expand Title I to permit the trial of unfair labor practice issues in a suit brought under §102. And again the argument is that the jurisdiction granted by Title I should be expanded in order to empower the courts to grant full relief. This argument is as unsound in this context as it was in *Calhoon* v. *Harvey*. For the structure and language of both the NLRA and LMRDA demonstrate that Congress intended the administrative procedures of the NLRB to be the exclusive means of protecting the right not to be discriminated against in employment because of union activity.

5. *Machinists* v. *Gonzales*, 356 U.S. 617, 618-621 (1958), held that a state court exercising its acknowledged jurisdiction over a membership dispute could, in order to "fill out" the remedy, award damages based on alleged union interference with job rights despite the fact that this "remedial action" invades the exclusive primary jurisdiction of the

NLRB. In *Borden*, however, the Court carefully reserved the question of "the extent to which the holding in *Garmon*, 359 U.S. 236, *supra*, qualified the principles declared in *Gonzales* with respect to jurisdiction to avoid consequential damages," 379 U.S. at 697.

The AFL-CIO, in its *amicus* brief in *Transit Employees* v. *Lockridge*, No. 76 this term, pp. 10-20, has set out its reasons for believing that the *rationale* of *Garmon* completely undermines the proposition that a court with the authority to adjudicate membership rights may also adjudicate employment rights under the guise of awarding consequential damages, and we respectfully direct the Court's attention to that brief for a complete statement of our views. We simply note here that in essence the argument developed at length in *Lockridge* is that the above noted portion of *Gonzales* is inconsistent with the line of post-*Garmon* authority recognizing that clear and definite lines, based on the "nature of the activities" in question (359 U.S. at 243), are required in delimiting the area open to the NLRB on the one hand and to the courts on the other, in order to insure that the narrow exceptions to the exclusive primary jurisdiction rule do not serve to undermine the basic doctrine, see *Mine Workers* v. *Gibbs*, 383 U.S. 715, 729-730 (1966); *Local 1625 Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 105 (1963); *Hanna Mining Co.* v. *District 2 MEBA*, 382 U.S. 181, 192-193 (1965); *Local 1416 ILA* v. *Ariadne Shipping Co.*, 397 U.S. 195, 200-201 (1970); *Linn* v. *Plant Guards*, 383 U.S. 53, 64-65 (1966). Thus the theory of *Gonzales* is unsound because its focus on the legal labels utilized to characterize the claim presented, rather than on the nature of the underlying activity in question, permits the plaintiff by artful pleading to shift the line of demarcation in the direction of greater or lesser court jurisdiction depending on the nature of his interests. This is completely inconsistent with the recognition that "Congress has entrusted administration of the labor policy for the Nation to [the NLRB]" and that "administration is more than a means of regulation; administration is regulation" *Garmon*, 359 U.S. at 242, 243.

These considerations are fully applicable here. It is just as destructive to the sound administration of the national labor policy to have a shifting and uncertain line setting the bounds between the jurisdiction of the NLRB and the federal courts as it is to have such a line between the Board and the state courts. In both instances the proper approach is one which starts from the recognition that it is Congress's intent that the courts are simply to regulate and protect membership rights, and that the regulation and protection of employment rights is to be a matter within the exclusive primary jurisdiction of the Board.

CONCLUSION

For the reasons set out above, as well as those stated by the Petitioner, the decision below should be reversed.

Respectfully submitted,

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August, 1970